GUTHRIE WAUGH BHD. v. MALAIPPAN MUTHUCUMARU

[O.C.J. (Sharma J.) November 18, 1971]

[Seremban — Civil Suit No. 138 of 1970]

Contract — Consideration — Debt — "Deed of arrangement" for payment of — Whether void and of no legal effect — Contracts (Malay States) Ordinance, 1950, ss. 2(a),(b), (c),(d), (g) and 26(b)(c).

The plaintiffs claimed a sum of $123,050.61 and interest as due from the defendant who was alleged to have "assumed responsibility" for such payment under a "deed of arrangement" executed by him on June 24, 1970. The averment in paragraph 2 of the statement of claim was that goods to the value of $123,050.61 were supplied by the plaintiffs "to the estates" specified in the said paragraph. It did not say that the goods were supplied to the defendant. The defence was that the defendant was not liable for goods which had been supplied not to him but to the said estates and that the so-called "deed of arrangement" was void for want of consideration.

The deed stipulated that goods were to be supplied by the plaintiffs "to the estates named in the schedule" and all that the defendant appeared to have agreed to do was to assume responsibility for the payment of $123,050.61, being the amount due to the plaintiffs in respect of those supplies.

Thus, the following two issues were to be determined by the court: (1) whether the statement of claim disclosed any cause of action; and (2) whether the deed of arrangement dated June 24, 1970, was void and of no legal effect as against the defendant. The former was tried as a preliminary issue.

Held: (1) as far as the defendant was concerned, the deed was executed by him neither for any past consideration, nor in respect of any forbearance to sue him for the supplies made to the estates, nor in consideration of any promise to supply him goods on credit in future. The deed was without consideration as understood in the light of the Contracts (Malay States) Ordinance, 1950. All that the defendant could be said to have undertaken was a moral obligation;

(2) as there was no consideration for the execution of the deed, it was unnecessary to say whether consideration could be proved by parol evidence;

(3) therefore, in the light of the evidence and the authorities, judgment was in favour of the defendant on the preliminary issue that the statement of claim disclosed no cause of action.

Observations on "consideration" in the law of contract as well as the admissibility of parol evidence in the interpretation of a written document.

Cases referred to:-

(1) *Hutton* v. *Watling* [1948] Ch. 398 at p. 403.

(2) *Brown* v. *Byrne* 118 E.R. 1304 at p. 1309.

(3) *Clifford* v. *Turrell* (1845) L.J. Ch. 390 at p. 397; 62 E.R. 826.

(4) *Frith* v. *Frith* [1906] A.C. 254 at p. 259.

(5) *Turner* v. *Forwood* [1951] 1 All E.R. 746 at p. 749.

(6) *Achal Ram* v. *Raja Kazim Husain Khan* 32 I.A. 113.

(7) *Haniffunnissa* v. *Faizunnissa* 38 I.A. 85.

(8) *M. Krishnayya* v. *Mohammed Galeb Sahib* A.I.R. 1930 Mad. 659.

(9) *Mohammad Taki Khan* v. *Jang Singh* A.I.R. 1935 All. 529.

(10) *Shore* v. *Wilson* 9 Cl. & Fin. 355; 8 E.R. 450 at p. 532.

(11) *Rann & Other Executors of Mary Hughes* v. *Isabella Hughes, Administratrix of J. Hughes in Error* 7 T.R. 350; 101 E.R. 1014 (note).

(12) *Wigan* v. *English & Scottish Law Life Assurance Association* [1909] 1 Ch. 291 at p. 297.

(13) *Raja of Venkatagiri* v. *Sri Krishnayya Rao Bahadur* A.I.R. 1948 P.C. 150, at p. 155.

(14) *Eastwood* v. *Kenyon* 113 E.R. 482 at p. 486.

(15) *Sada Ram* v. *Sahazada Ram* A.I.R. 1934 Lah. 789.

(16) *The Alliance Bank* v. *Broom* 62 E.R. 631 at p. 632.

(17) *Fullerton* v. *Provincial Bank of Ireland* [1903] A.C. 309 at p. 313.

(18) *Miles* v. *New Zealand Alford Estate Co.* (1886) 32 Ch. D. 266 at 289.

(19) *Kali Prasad Tewari* v. *Raja Sahib Prahlad Sen* (1869) 11 Bengal Law Rep. 111 at p. 122.

(20) *J.M. Wotherspon & Co. Ltd.* v. *Henry Agency House* [1962] M.L.J. 86.

(21) *Durga Prasad* v. *Baldeo & Ors.* I.L.R. 3 All. 221.

(22) *Manna Lal* v. *The Bank of Bengal* I.L.R. 1 All. 309.

(23) *Nanak Ram* v. *Mehin Lal* I.L.R. 1 All. 487.

(24) *Ramaswamy Pandia Thalavar* v. *Andhappa Chettiar* (1960) 16 Mad. L.J. Rep. 422.

(25) *Muthukaruppa Mudali* v. *Kathappudayan* [1914] Mad. L.J. Rep. 249; [1914] M.W.N. 706.

(26) *Liquidator, Bagha Co-operative Society* v. *Debi Mangal Prasad Sinha & Ors.* A.I.R. 1937 Pat. 410.

(27) *Ghulam Hussain* v. *Faiyaz Ali* A.I.R. 1940 Oudh 346.

(28) *Kali Charan* v. *Abdul Rahman* A.I.R. 1918 P.C. 226.

CIVIL SUIT.

M. Shankar for the plaintiffs.

N. Ramachandran for the defendant.

Cur. Adv Vult.

Sharma J. (read by **Wan Suleiman J.**): The specially indorsed writ of summons in this case was filed by the plaintiffs on 22nd August 1970. It claimed a sum of $123,050.61 and interest as due from the defendant who it alleged had "assumed responsibility" for such payment under a "deed of arrangement" executed by him on 24th June 1970. The statement of claim gives the impression that the claim of the plaintiffs is very simple, straightforward and undisputable. The averment in paragraph 2 of the statement of claim is that goods to the value of $123,050.61 were supplied by the plaintiffs "to the estates" specified in the said paragraph. It does not say that the goods were supplied to the defendant. The defence is that the defendant is not liable for goods which had been supplied not to him but to the said estates and that the so-called "deed of arrangement" is void.

The defendant amended his statement of defence on 30th March 1971. The suit came up for hearing on 16th April 1971 when the plaintiffs amended paragraphs 3 and 4 of the statement of claim. It was only on that date that the learned counsel for the defendant said in unmistakable and clear terms that where the statement of defence stated that the deed of arrangement was void it meant that it was void for want of consideration. On the pleadings as they then stood I framed the following two issues: —

(1) Does the statement of claim disclose any cause of action?

(2) Is the deed of arrangement dated 24th June 1970 void and of no legal effect as against the defendant?

I may add here that both the statement of claim and the statement of defence were re-amended in the course of the trial and that deletion of paragraphs 3, 4 and 5

of the amended statement of defence rendered issue No. 2 unnecessary.

Issue No. 1 was tried as a preliminary issue. At the close of the arguments on that issue I had taken the view that if the plaintiffs had expressly stated in their pleadings that the deed of arrangement was for consideration the defendant was not, on the pleadings alone, entitled to suggest that there was no consideration for that deed because for the purposes of argument under O. 25 rr. 2 and 3 of the Rules of the Supreme Court the defendant would be deemed to have admitted all the facts stated in the statement of claim. I felt that if all the correspondence appearing in Exhibits A and B was considered and taken into account it could at least be urged that there in fact was some semblance of consideration to be seen, if not found, in that evidence. However my view, at that time, was that the interests of justice would best be served if there was an amendment of the statement of claim so that the real question to be determined should look apparent on the pleadings and that the matter should not be decided on mere technicalities. I did not at that stage feel inclined to dismiss the plaintiffs' claim merely by an examination of the deed A 10 and without hearing any other evidence from the parties (besides what appeared in Exhibits A & B). The statement of claim having been re-amended I framed the following additional issue: —

"Was there consideration for the deed A 10?"

The statement of claim calls the deed A 10 a deed of arrangement. I do not know why the solicitors for the plaintiffs expressly chose to call it by that description. One normally comes across that expression in bankruptcies or under the company law. A composition agreement may take the form of an agreement by which the creditors agree to abandon their claim in consideration of receiving a composition on their debts, that is, a smaller sum bearing an agreed proportion to the amount of their respective claims. It may also take the form of an assignment by which the debtor assigns the whole of his property to a trustee for realisation and rateable distribution of the proceeds amongst all his creditors or amongst those who assent to and take the benefit of the assignment and the creditors in consideration of such assignment release their original claims and accept the dividends payable under the agreement in discharge of their debts. The deed A 10 does not purport to be such an agreement between the plaintiffs and the defendant. Nothing in fact can turn on what the plaintiffs chose to call this deed. It is the contents of this deed and the circumstances in which it was executed that are in the last analysis material to determine the questions involved in this suit.

The evidence produced at the trial was very brief. The defendant elected not to call any evidence and stood on his submissions alone. The only witness called by the plaintiffs was Mr. Currie, the general manager of the chemicals division of the plaintiff company. He sought to prove that the plaintiffs dealt only with the defendant and not with the various estates which are referred to in the schedule to the deed Exhibit A 10 and that there was consideration for the deed Exhibit A 10 executed by the defendant. This deed is the very foundation and the basis of the plaintiffs' claim.

The deed Exhibit A 10 dated the 24th day of June 1970 refers to the plaintiffs as "the creditor" and the defendant as "the debtor." It recites: —

"WHEREAS goods have been supplied by the creditor to the estates named in the schedule hereto and the sums set against their respective names in the said schedule amounting to dollars one hundred and twenty three thousand and fifty and cents sixty-one ($123,050.61) are still due and owing to the creditor."

"AND WHEREAS the debtor has assumed responsibility for the payment to the creditor of the said sum of... and has agreed with the creditor to enter into this deed in manner hereinafter appearing." (The underlining is mine.)

The deed then goes on to say: —

"In pursuance of the said agreement and in consideration of the premises the debtor hereby covenants....."

It is obvious from the reading of this deed that goods were supplied by the plaintiffs "to the estates named in the Schedule" and all that the defendant appears to have agreed to do was to assume responsibility for the payment of $123,050.61 being the amount due to the plaintiffs in respect of those supplies.

A document is generally conclusive as to the terms which it was intended to record but there is nothing to stop the parties from recording a part of their contract in writing and leaving the rest oral or embodied in another document. What difference should it make whether the oral and written terms are construed as separate agreements or as parts of a single contract. The distinction becomes important only when the principal contract is one which the law requires to be in writing. Whether a document contains all or merely a part of the terms agreed by the parties depends in theory upon their intention. It has to be decided objectively according to the construction of the document and the surrounding circumstances. (See *Hutton* v. *Watling*[1]). If the document *appears* to have been intended to deal exhaustively with a particular subject, evidence of a prior agreement on the same subject, matter will stand excluded. There is a presumption that a document recording contractual terms is intended to embody the whole of the contract. The existence of a separate collateral agreement is of course a distinct issue with the burden of proof on the party who seeks to invoke it. The test which the courts usually apply in order to decide the intention of the parties is to ask whether the alleged prior agreement would contradict the terms of the written document. (See *Brown* v. *Byrne*[2]).

In *Clifford* v. *Turrell*[3] Lord Lyndhurst L.C. said:

"... the settled rule is that you may prove a further consideration which is consistent with the consideration stated on the face of the deed. You cannot be allowed to prove a consideration inconsistent with it, but you may prove another which stands with it."

In *Frith* v. *Frith*[4] Lord Atkinson delivering the judgment of the Privy Council said:

"Parol evidence was admitted to prove that additional consideration was in fact given for the deed by which the plaintiff

was induced to execute it, namely an agreement by the defendant that he would pay to the plaintiff an annuity of £40 per annum during his life and to give to him a house worth £10 a year to live in. Specific performance of the parol agreement was decreed. The Vice-Chancellor (Sir L. Shadwell) in delivering judgment in the case, lays down, in the opinion of their Lordships correctly, the rule of law upon this subject. He said:

"Rules of law may exclude parol evidence where a written instrument stands in competition with it, but it has long been settled that it is not within any rule of this nature to adduce evidence of a consideration additional to what is stated in a written instrument."

And then adds:

"The rule is that where there is one consideration stated in the deed, you may prove any other consideration which existed, not in contradiction to the instrument; and it is not in contradiction to the instrument to prove a larger consideration than that which is stated."

Again in *Turner* v. *Forwood*[5] Denning L.J. (as he then was) said:

"The reason for the rule in *Clifford* v. *Turrell* is that in the old days a nominal consideration was inserted so as to make the conveyance or assignment good, but it was not inserted to state the consideration which was agreed to be given to the other party. There was, therefore, no bar to the proof of a contractual consideration because the deed was not intended to embody it. The rule excluding parol evidence only applies when the parties set down in writing the terms agreed. Parol evidence has been held to be admissible in the case of the assignment of property or in that of the appointment of an attorney: *Frith* v. *Frith*."

Also see *Achal Ram* v. *Raja Kazim Husain Khan*[6] and *Haniffunnissa* v. *Faizunnissa*.[7] (For comments on the judgment of the Privy Council in *Haniffunnissa* v. *Faizunnissa*[7] see *M. Krishnayya* v. *Mohammed Galeb Sahib*[8] and *Mohammad Taki Khan* v. *Jang Singh*[9]).

There was some correspondence between the parties before Exhibit A 10 was executed by the defendant. It is well known that when a promise is arrived at by means of correspondence and the final document executed is the result of negotiations preceding it the whole correspondence can be considered to determine what the promise is. In such a case there is no question of varying the terms of a document but of determining what the circumstances were under which the document came into being. It was for that reason that I allowed oral evidence to be led and produced in this case, evidence which went beyond the four corners of the deed in question.

It was contended by the learned counsel for the plaintiffs that consideration mentioned in the document (Exhibit A 10) was not one of the terms but a mere recital of fact which could be contradicted or varied under proviso (a) of section 92 of the Evidence Ordinance. Section 92 of the Evidence Ordinance provides that:

"When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91 of this Ordinance, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms."

It is therefore clear that oral evidence to vary the terms of any agreement is wholly inadmissible in evidence unless the case falls under one of the provisos to section 92. Proviso (a) to section 92 of the Evidence Ordinance lays down as follows:

"Any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law."

Under proviso (a) evidence may be adduced as to *want* or *failure* of consideration. This is, however, totally distinct from the *amount or nature* of consideration. If the amount or nature of consideration could be proved by oral evidence to be other than that stated in the document, there seems no reason why this was left out from proviso (a). A statement in a document that a consideration has been paid no doubt is a recital in a deed and does not constitute one of the terms of the contract but the amount of consideration is certainly a term of the contract in a sale deed and therefore it cannot be open to a party to prove a variation in the amount of consideration. Consideration is undoubtedly a term — and a very important term — in a contract of sale. A sale deed may mention a consideration for the transfer of the property. A deed of gift may mention that the term of the transfer of the property is that there is no monetary consideration. In a deed of gift it is not open to a party to prove that although the terms of the deed say there was no monetary consideration, still the term was different from what was stated in the document and that there in fact was a monetary consideration for the document. It amounts to contradicting an important term of the deed.

If the statement as to the consideration be taken as a recital of a fact section 92 is not attracted. If it be taken as the recital of a term, the agreement might come under proviso (a) to section 92 if that proviso is applicable. If there is any ambiguity as to the consideration stated in the document, oral evidence can be given to clear up the ambiguity.

In *Shore* v. *Wilson*[10] Tindal C.J. said:

"The general rule I take to be, that where words of any written instrument are free from ambiguity in themselves and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict plain common meaning of the words themselves and that in such case evidence *dehors* the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument is utterly inadmissible. If it were otherwise no lawyer would be safe in advising upon the construction of a written instrument nor any party in taking under it for the ablest advice would be controlled and the clearest title undermined if, at some future period, parol evidence of the particular meaning which the party affixed to his words or of his secret intention in making the instrument or of the objects he meant to take benefit under it might be set up to contradict or vary the plain language of the instrument itself."

I will at a later stage in this judgment deal with the question whether there was any consideration other than the "consideration" referred to in the deed Exhibit A 10 and whether that "consideration" was a mere recital in the deed.

According to P.W.1 the defendant had a personal account and an estates account. These two accounts were consolidated only after 14th August 1970. Exhibit B26 is the personal account of the defendant. An examination of Exhibit B26 reveals that the defendant had on 1st January 1969 a debit balance of $5,286.09. On 29th November 1969 this debit had been brought down to $17.40 and on the same date his account shows a credit balance of $1,464.48. At any rate the amount due from the defendant on his personal account as on 1st April 1970 was $6,098.46 as shown in Exhibit B26. This suit is based on Exhibit A10 and the schedule to that deed makes no mention of the defendant's personal account. The pertinent question which arises is that if the plaintiffs were dealing only with the defendant and not the various estates and looked only to the defendant for payment, where was the necessity to have separate estates accounts. P.W.1 admits that there was an account for each estate referred to in the schedule to Exhibit A10. He further admits that the defendant was paid commission for introducing those estates *as the customers of the plaintiffs*. It obviously meant that the defendant was introducing business of those estates to the plaintiffs and it was those estates which were the customers of the plaintiffs. The position of the defendant as far as supplies to those estates were concerned was merely that of a commission agent. Even if he placed orders on behalf of those estates, the plaintiffs were fully aware that the defendant was acting only as an agent and not as a principal. The question of an undisclosed principal also did not arise. The plaintiffs continued to send statements of account to the estates in question. That itself is indicative of the fact that the plaintiffs looked to the estates and not the defendant for payment and that in supplying goods they were dealing with the estates and not the defendant. Invoices were prepared by the plaintiffs and they contained the names of the plaintiffs' customers to whom supplies were made. These supplies may no doubt have been made at the request of the defendant but how could that alone saddle him with liability in respect of those supplies if he was only an agent for the parties. It may be true that the statements of account were sent by the plaintiffs as a matter of routine as it were to the addresses given at the head of the invoices but the invoices themselves were prepared by the plaintiffs. In any case that is hardly any explanation of the plaintiffs' failure to debit the account of the defendant if what was agreed and understood was that the supplies were made to the defendant and to his account alone. In fact the evidence shows that the plaintiffs did not think of even sending to the defendant copies of the statements of account which they forwarded to the estates. Goods may have been supplied to the estates at the request of the defendant. The statements of account sent to the estates did not disclose the commission the defendant was entitled to. This again is a clear pointer that the plaintiffs looked to the estates for payment As far as the defendant was concerned his only interest was the commission he was going to earn. The reason given by P.W.1 that statements of account were not sent to the defendant because the plaintiffs' system of accounts was mechanised is not only faint and feeble but extravagantly foolish. The question is whether apart from the deed sued upon is there any evidence in writing which tends to indicate that at or before the time the supplies were made by the plaintiffs to the estates the defendant had held himself out as the person liable to the plaintiffs for those supplies. If the defendant was the principal debtor throughout the period of supplies his consent to the consolidation of accounts was not necessary at all and the consolidation of those accounts should have been a very easy process. The statement sent to the estates do not state even in brackets "A/c defendant."

Exhibit B1 is a letter written by the defendant on 20th June 1969. The second and third paragraphs of this letter show that up to that time the plaintiffs were dealing with the estates and that was the "system" under which supplies were made. Exhibit B3 and B4 also point the same way. In Exhibit B24 the defendant says "The amount which *I owe* to your company has not been included..." The defendant thus was telling the plaintiffs that they had not included in the schedule to the deed what was due and owing by him to the plaintiffs. Again Exhibit P1 is very significant. The first three paragraphs of that letter read:—

"I refer to your visit to your Seremban office on Tuesday, 18th November 1969 and to your conversation with me with regard to the outstanding accounts by the estates who are under my Agency.

As you wanted a guarantee for the amount owed by all the estates, my agency will undertake to collect from the Estates concerned and pay to you as I have been doing since February 1968."

"In the meantime, as requested by you for a security and sureties, I have discussed the matter with the persons who will be my guarantors and they have all suggested that I should draw up a legal document..."

I have no doubt that the plaintiffs were dealing with the estates and those estates alone were liable to the plaintiffs. The plaintiffs were anxious to bring about a change so that they did not have to look to the estates for payment and could hold the defendant alone responsible in respect of supplies made to those estates. This change was sought to be brought about by the execution of the deed Exhibit A10 but prior to that the intention of the parties and the system prevailing was that the estates alone were responsible to the plaintiffs for payment. I do not consider it necessary to minutely go into all the correspondence and documents produced in this case. I cannot find the position otherwise than I have stated above. In re-examination P.W.1 did say that it was the defendant who took physical delivery of the goods either in his own transport or in a transport nominated by him and that he named a destination where goods were to be delivered. This, I think, was only an improvement on the earlier statement of the witness and an afterthought. In any case the pleadings are quite clear that the goods were supplied to the estates.

The more difficult question in this case is the question of consideration. Section 2 (a), (b) and (c) of the Contracts (Malay States) Ordinance 1950 defines a "proposal", a "promise", a "promisor" and a "promisee". Section 2(d) of the said Ordinance constitutes what may be called the key to the doctrine of "consi-

deration" under our law as applicable "within the Malay States only." It stipulates that if: —

(a) at the desire of the promisor,

(b) the promisee or any other person,

(c) has done or abstained from doing or promises to do or abstains from doing something,

(d) such act or abstinence or promise is called a consideration for the promise.

In the States where the Contracts Ordinance is applicable it is obvious that a unilateral declaration is not enough to make a contract and that no question of a contract under seal arises unless the matter is covered by section 26(a) of the Contracts Ordinance. Clause (g) of section 2 again enunciates that an agreement not enforceable by law is void. In other words an agreement can be a contract only when it is enforceable by law. In fact the word implies a valid contract and unenforceable agreements cannot be contracts. If the agreement is enforceable it becomes a contract but not so if it is unenforceable. The contractual obligation must be such as is enforceable by law. It must be a legal obligation and not merely moral, social or religious.

In *Rann & Other Executors of Mary Hughes* v. *Isabella Hughes, Administratrix of J. Hughes in Error*[11] Lord Chief Baron Skynner said:

"It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration; such agreement is *nudum pactum ex quo non oritur actio;* and whatsoever may be the sense of this maxim in the civil law, it is in the last mentioned sense only that it is to be understood in our law....

All contracts are, by the laws of England, distinguished into agreements by speciality and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written and not specialities, they are parol, and a consideration must be proved."

In the case of *Wigan* v. *English & Scottish Law Life Assurance Association*[12] Parker J. observed:

"It appears to me to be reasonably clear that the mere existence of a debt from *A.* to *B.* is not sufficient valuable consideration for the giving of a security from *A.* to *B.* to secure that debt. If such a security is given, it may of course be given upon some express agreement to give time for the payment of the debt, or to give consideration for the security in some other way, or, if there be no express agreement, the law may very readily imply an agreement to give time. It may not be a definite time, but to forbear for some indefinite time in consideration of the security being given. And further than that, if there is no express agreement, and no agreement can be implied at the time and under the circumstances at and under which the indenture giving the further security is executed, yet if that security be communicated to a person who could otherwise sue on the debt, and on the strength of that security he does in fact forbear to sue on the debt, he does give that time with the object of securing which the security is presumably given, and then I think it appears on the cases that there is sufficient consideration, though in a sense it is an *ex post facto* consideration, for the security which is given.... It seems to me, therefore, that there is no authority against, and a great many authorities in favour of, the proposition that in order to have a consideration for a further security there must be an agreement, express or implied, to give time or some further consideration, or else there must be an actual forbearance which *ex post facto* may become the consideration to support the deed."

Clause (d) of section 2 of the Contracts Ordinance postulates that *the promisor must "desire" the act of forbearance.* The facts in the case of *Raja of Venkatagiri* v. *Sri Krishnayya Rao Bahadur*[13] are summarised in the headnote of the case as follows:

"*A*, the plaintiff's father by a letter gave an undertaking to the defendant's natural father that he would supply money for the litigation if the defendant's adoption was challenged. In pursuance of this undertaking *A* advanced monies to the defendant from time to time for the expenses of litigation and after the death of *A* the plaintiff also did the same thing. Subsequently the defendant on request of the plaintiff executed the suit promissory note for the total amount advanced for the litigation, and it was stipulated therein that if the litigation was decided against the defendant in the Privy Council the plaintiff would not enforce the note. The litigation ended in favour of the defendant and therefore the plaintiff sued the defendant on the pronote. The defendant denied his liability and contended that the pronote was void for want of consideration."

Sir Madhavan Nair, delivering the judgment of the Privy Council, said:

"It was also argued that since the suit promissory note states its 'consideration' the respondent should not in law be allowed to plead that it is not supported by consideration. The argument appears to be based on a misunderstanding of the real nature of respondent's plea. When he denies liability under the note he is not to be understood as saying there is no consideration; what he says being that there is consideration but he will show that it is past consideration which, not having moved at the 'desire' of the promisor, *i.e.* himself, does not fall within section 2, Cl. (d), Contract Act. He is not precluded from doing so by any provision or principle of law.... No doubt the respondent pressed the appellant to furnish the necessary funds but in doing so he was only asking him to give effect to his grandfather's undertaking contained in the letter of 29th January. Their Lordships accept these findings. The result is that it cannot be held that the advances of money were made at the 'desire' of the respondent within the meaning of section 2, Cl. (d), Contract Act."

"It also follows from the findings that section 25, Cl. (2), Contract Act cannot be relied upon in support of the appellant's case. To invoke the aid of that provision it must be shown that there was a promise by the respondent to 'compensate' the appellant or his father for something which had been already done by them 'voluntarily' for him. The findings of the Courts which their Lordships have accepted show that the moneys which had been advanced were not advanced to the respondent 'voluntarily' but because of the undertaking.... They also show that in executing the promissory note the respondent was not promising to compensate the appellant for something which had been done for him voluntarily. It follows that the said promissory note is not supported by consideration."

It thus follows that to constitute good consideration under the Contracts (Malay States) Ordinance there must be an act, abstinence or promise on the part of the promisee or some other person *at the desire of the promisor.* The claim can be good only if the promisee acts, abstains or promises to do something in pursuance of the promise.

Except in the case of negotiable instruments and trusts it appears to be the rule that consideration should move from the promisee. The Contracts (Malay States) Ordinance 1950 clearly recognises past consideration (see section 26(b) and section 2(d)). The words in clause 2(d) of section 2 "has done or abstained from doing" sufficiently indicate this.

A forbearance to exercise a legal right is good consideration. *If at the instance of the debtor* the creditor forbears to sue, there is sufficiency of con-

sideration. Forbearance may be express or may be implied from the circumstances. The forbearer should give up something of value the reality of which should be measured by the state of his knowledge and not by the state of the law as it ultimately is found to be.

The words "has done or abstained from doing or does or abstains from doing or promises to do or to abstain from doing" in clause (d) of section 2 of the Contracts (Malay States) Ordinance 1950 indicate the wide ambit of the definition of "consideration." Past consideration, unlike in England, is quite valid in that part of our country where the Contracts Ordinance is applicable.

In *Eastwood* v. *Kenyon*[14] Lord Denman C.J. referring to the doctrine of moral obligation said:

"Indeed the doctrine would annihilate any necessity for any consideration at all inasmuch as the mere fact of giving a promise creates a moral obligation to perform it. The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, to the prejudice of real creditors."

Under the Contracts (Malay States) Ordinance the doctrine of precedent moral obligation is recognised only in the sphere of promises to pay a barred debt. Section 26(c) of the Contracts Ordinance provides for this.

For bearance involves the forgoing of the exercise of a legal right. The consideration lies in the detriment to the party who has a right to resort to court and the corresponding benefit to the other party who is saved from legal proceedings even though such benefit be for a short time.

The principle of moral obligation to pay the debt was referred to in the case of *Sada Ram* v. *Sahazada Ram.*[15] In that case Rangi Lal J. said:

"It is well established that where a creditor releases his debtor and accepts a new debtor in his place, the release of the original debtor furnishes a good consideration for the new contract."

The learned judge in that case did not say that a moral obligation constituted a good consideration although the headnote of the case indicates that. All that the learned judge said was that the defendant must also have *felt* a moral obligation to pay the debt because he had enjoyed the benefit of it jointly with his deceased brother.

Where a customer is called on by his bankers to give security *for money due from him* on a loan account and he by a letter agrees to give security and such a letter contains a list of the goods which the customer agrees to hypothecate *against the loan account* but subsequently refuses to deliver the documents relating to the goods, the defendant cannot say that there was no consideration for the letter given by him and that the court cannot enforce it. In *The Alliance Bank* v. *Broom*[16] it is observed:

"It appears to me that, when the plaintiffs demanded payment of their debt, and, in consequence of that application the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was that the plaintiffs did in effect give, and the defendant received, the benefit of some degree of forbearance; not, indeed, for any definite time, but, at all events, some extent of forbearance. If, on the application for security being made, the defendant had refused to give any security at all, the consequence certainly would have been that the creditor would have demanded payment of the debt, and have taken steps to enforce it. It is very true that, at any time after the promise, the creditor might have insisted on payment of his debt, and have brought an action; but the circumstances necessarily involve the benefit to the debtor of a certain amount of forbearance, which he would not have derived if he had not made the agreement."

Fullerton v. *Provincial Bank of Ireland*[17] was another case in which a customer of the bank when pressed by the bank undertook by letter to deposit a title deed as security for the overdraft. He deposited the title deed but the bank did not register the charge and he afterwards mortgaged the estate to the appellants who registered the charge without any notice of the prior charge. At page 313 Lord Macnaghten said:

"My Lords, this point seems to me to be settled by authority. In such a case as this it is not necessary that there should be an arrangement for forbearance for any definite or particular time. It is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearance for a time, and that forbearance for a reasonable time was in fact extended to the person who asked for it. That proposition seems to me to be established by the case of *Alliance Bank* v. *Broom* to which my noble and learned friend Lord Lindley referred yesterday, and other cases, among which I may mention *Oldershaw* v. *King* (157 E.R. 213) with the observation on that case and the case in *Drewry* and *Smale*, by Bowen L.J. in *Miles* v. *New Zealand Alford Estate Co.* and I may add that the proposition seems to be good sense."

In *Miles* v. *New Zealand Alford Estate Co.*[18] Bowen L.J. said:

"Speaking broadly, what has to be determined is, in my opinion, whether there was at a critical moment any forbearance to press a real claim on the part of the company, or of the directors of the company, who had ample powers under their articles of association to act for the company, and, if so, whether such forbearance was brought about by the express or implied request of Mr. Grant, and in consideration of his guarantee. A valuable consideration may, of course, either consist of some right, interest, profit, or benefit which accrues to one party, or some forbearance, or detriment, or loss, or responsibility, which is given to or undertaken by the other. We have to see here in the first place whether there was forbearance promised, in which case the promise would be the consideration for the guarantee, or whether there was an actual forbearance given at the request of the guarantor in return for something."

Forbearance can be inferred from surrounding circumstances where, for example, the plaintiff in consideration of the promise to execute a registered sale deed desists from suing the defendant, there is sufficient consideration for the agreement executed by the defendant.

As stated earlier the words "such act or abstinence or promise" in clause (d) of section 2 make it clear that the act of forbearance or promise is consideration provided it is done at the desire of the promisor.

Under section 26(b) of the Contracts Ordinance it must be shown that what was done by the plaintiff was done for the promisor. Section 26(c) covers only the case of a person who would be liable to pay but for limitation barring the suit.

In *Kali Prasad Tewari* v. *Raja Sahib Prahlad Sen*[19] the Privy Council said:

"... It had become the established practice of the courts in India, in cases of contract, to require satisfactory proof that consideration had been actually received according to the terms of the contract; and that it had never been held there that a contract made under seal of itself has imported that there was a sufficient consideration for the agreement. The latter proposition seems to be indisputable."

In the case of *J.M. Wotherspon & Co. Ltd.* v. *Henry Agency House*[20] Suffian J. (as he then was) dealt with a number of cases under section 25(2) of the Indian Contract Act corresponding to section 26(b) of the Contracts (Malay States) Ordinance 1950, and held that an act done at the suggestion of another was not done voluntarily and that it could be said to have been done voluntarily only if it was done out of one's own free will or choice and not at the suggestion of another. (Also see *Durga Prasad* v. *Baldeo & Others*[21]).

In the case of *Manna Lal* v. *The Bank of Bengal*[22] it was said by the court:

"We do not quite understand the judge's argument as to the benefit which the appellant derived from the banking transaction. It does not appear that he had received any portion of the *hundis* when discounted; but, assuming that he had done so, and admitting that under the circumstances he was liable on the *hundis*, neither the antecedent benefit, nor the existing liability, nor the anticipated advantage to which the judge alludes, would constitute a consideration as defined in the Contract Act. To constitute a consideration as defined in that Act there must be an act, abstinence or promise on the part of the promisee or some other person at the desire of the promisor. On the facts found there was no such act, abstinence, or promise, and therefore there was no consideration for the mortgage, and the contract is void. On this ground we must allow the appeal, and reversing the decrees of the Courts below so far as they decree the claim, we must dismiss the suit with costs."

In the case of *Nanak Ram* v. *Mehin Lal*[23] the headnote says:

"Where *N* advanced money to *K* on a bond hypothecating *K*'s property, and mentioning *M* as surety for any balance that might remain due after realization of *K*'s property, *M* being no party to *K*'s bond but having signed a separate surety-bond two days subsequent to the advance of the money, held that the subsequent surety-bond was void for want of consideration under section 127 of the Indian Contract Act."

It has been held in the case of *Ramaswamy Pandia Thalavar* v. *Andhappa Chettiar*[24] that section 25 of the Indian Contract Act is exhaustive. If the words in a document are clear and unambiguous there cannot be any room to fall back upon suppositions and supposed intentions of the parties.

Advances made on the recommendation of a person are not sufficient consideration in law for a subsequent promise by him guaranteeing their payment. See *Muthukaruppa Mudali* v. *Kathappudayan*.[25]

The case of the *Liquidator, Bagha Co-operative Society* v. *Debi Mangal Prasad Sinha & Others*[26] was cited by the learned counsel for the plaintiffs for the proposition that where a person states in a letter written by him to the creditor that he shall be responsible for the payment of the debt due to such creditor from another person, the person writing the letter stands in the position of a principal debtor and not a surety. The full facts of the case are not to be found in the report. It, however, appears that one Munshi Muna Lal borrowed some money from the Bagha Co-operative Society on behalf of Debi Mangal Prasad Sinha. the first defendant. The first defendant had written a letter to the following effect to the Bagha Co-operative Society:

"in obedience to your letter.... I beg to state that I hold responsible myself regarding the payment of the dues against Munshi Muna Lal, a member of the Bagha Co-operative Society."

Wort J. in this case said:

"The letter is then signed by defendant 1. It is rather difficult to ascertain from the plaint exactly what the case of the plaintiff is: Whether it is a case of defendant 1 being a surety, whether defendant 1 was to be looked upon as a principal debtor, or whether Munshi Muna Lal was to be looked upon as the principal debtor. But one matter is perfectly clear and that is that the letter of 8th September 1927 does not put defendant 1 who wrote the letter in the position of a surety; he becomes by that letter on its proper construction the principal debtor whatever the position may have been prior to the date upon which the letter was written."

It does not appear from the judgment whether the question of the existence of any consideration between the first defendant and the plaintiff was ever raised or gone into in that case. Again the case of *Ghulam Hussain* v. *Faiyaz Ali*[27] was relied upon by the counsel for the plaintiff. That, however, is a case under section 127 of the Indian Contract Act. In the course of the judgment Thomas C.J. and Ziaul Hassan J. said:

"Only two points have been urged by the learned counsel for the appellants, namely (1) that the surety bond was without consideration and cannot therefore be enforced and (2) that the guarantee in question related only to the period of one year beginning from the date of the bond, or from the date of the lease. As regards the first point, we are clearly of opinion that in view of section 127, Contract Act, the surety bond cannot be held to be without consideration. That section clearly lays down that anything done, or any promise made for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee... The word "done" in section 127 shows that past benefit to the principal debtor can be good consideration for a bond of guarantee."

Their Lordships then went on to quote from the case of *Kali Charan* v. *Abdul Rahman*[28] where dealing with the question of lack of consideration Their Lordships of the Privy Council had said:

"This was an idle defence. There was ample consideration for the bond; anything done, or any promise made for the benefit of the principal, may be a sufficient consideration to a surety for giving a guarantee."

In the same case[27] the learned judges went on to say:

"Under section 127 of the Act it is not necessary that the thing done or the promise made for the benefit of the principal debtor should be at the desire of the surety and that that section has implied in it some such expression as 'notwithstanding anything contained in section 2(d) of the Act', for, otherwise, there was no need to enact section 127 inasmuch as anything done or any promise made for the benefit of the principal debtor, if done or made at the desire of the surety would clearly come under section 2(d)."

The plaintiffs' claim against the defendant, however, is as a principal debtor and not as a surety.

Section 26 of the Contracts (Malay States) Ordinance 1950 enacts:

"An agreement made without consideration is void, unless —

(a) it is expressed in writing and registered under the law (if any) for the time being in force for the registration of such documents, and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

(b) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless

(c) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits."

The plaintiffs in order to succeed must either show that there was consideration for the execution of the deed Exhibit A10 or bring their case under clauses (a), (b) or (c) of section 26 of the Contracts (Malay States) Ordinance. According to P.W.1 the defendant sent a post dated cheque with each order and that if such a cheque did not accompany the order the plaintiffs would not supply goods to the estates. If that was so, the plaintiffs should have in their possession cheques amounting to $123,050.61. P.W.1 further went on to say that it was the defendant himself who wanted to send a post dated cheque with each order. I am not prepared to and do not believe P.W.1 on that. No reasonable man putting himself in the position of the defendant would like to take upon himself the onerous and riskful task of placing an order with the plaintiffs and accompanying it with a post dated cheque, especially when I have already found as a fact that the plaintiffs looked for and expected payments for the supplies from the estates and not the defendant until the deed Exhibit A10 was executed. Furthermore if the handing in of post dated cheques was the invariable practice a mention of it was bound to have found a prominent place in the correspondence between the parties and in the deed Exhibit A10 itself. In my view there was no necessity or use of the deed Exhibit A10 if the plaintiffs were the holders of the cheques totalling $123,050.61. At the time Exhibit A10 was executed the plaintiffs' debtors were the estates and not the defendant. There could then be no forbearance to sue as against the defendant. I do not think P.W.1 was at all frank when he said that the defendant fully understood that the plaintiffs intended to and could take legal action against him on the cheques. The plaintiffs knew, and I do so hold, that the defendant was an agent for the estates and was not acting as a principal in respect of the supplies made to the estates. The various estates. and not the defendant, being the debtors, I fail to understand how any of the clauses of section 26 of the Contracts Ordinance can be said to be applicable. The suit is not on the cheques. Some of the cheques might have been dishonoured but that is neither here nor there in as far as the issue of the existence of consideration for the execution of Exhibit A10 is concerned. Even if the defendant was aware that he could be sued on the cheques unless he executed the deed Exhibit A10, such a knowledge alone would not constitute consideration for the deed executed, a deed which makes no reference whatsoever to those cheques I find that as far as the defendant was concerned, the deed Exhibit A10 was executed by him neither for any past consideration, nor in respect of any forbearance to sue him for the supplies made to the estates, nor in consideration of any promise to supply him goods on credit in future. In short the deed was without consideration as understood in our law. The fact that the deed is under seal makes no difference whatsoever. All that the defendant can be said to have undertaken was a moral obligation and no more.

Having come to the conclusion and the finding that there was no consideration for the execution of the deed Exhibit A10, it is now unnecessary for me to say whether consideration could be proved by parol. I have taken all the evidence, written and oral, into consideration. The plaintiffs' suit is consequently dismissed with costs. Having now had the time and the opportunity to give this matter serious thought and consideration I, in fact, am of the view that in the light of the evidence and the authorities I should, in the first instance, have found in favour of the defendant on the preliminary issue that the statement of claim disclosed no cause of action.

Judgment for the defendant.

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